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Supreme Court, U.S.
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No. 87-1764

In The

Supreme Court of the United States

October Term, 1987

ALIMEG, INC., an Oregon corporation,

Petitioner,

v.

SYLVIA SHLIM,

Respondent,

and

CML, INC., an Oregon corporation,

Defendant.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Is a landlord who has sought and obtained a preferential payment of rent under 11 U.S.C. § 503 estopped from enforcing a preexisting forfeiture under state law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. The Petition Does Not Raise A Federal Question	4
II. The Question Presented In The Petition Was Not Raised Nor Ruled Upon Below	5
III. The Decision Below Is Supported By Independent And Adequate State Grounds	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

FEDERAL:

Bell v. Maryland, 378 U.S. 226 (1963) 6

Fuller v. Oregon, 417 U.S. 40, 50, note 11 (1974) 5

Herb v. Pitcairn, 324 U.S. 117 (1945) 6

Illinois v. Gates, 462 U.S. 213 (1983) 5

STATE:

Reeves v. Baker, 270 Or. 837, 530 P.2d (1974) 6

Sanger v. Vancouver - Portland Bus Company, 209 Or. 37, 298 P.2d 835, 304 P.2d 448 (1956) 5

OTHER AUTHORITIES

FEDERAL STATUTES:

11 U.S.C. § 365(d)(4) 4, 5

11 U.S.C. § 503(b) 4, 5

28 U.S.C. § 1257(3) 2, 5

STATE STATUTES:

ORS 91.090 6

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Respondent, Sylvia Shlim, respectfully prays that the petition for certiorari to review the judgment and opinion entered in this proceeding by the Oregon Court of Appeals on September 2, 1987, be denied.

OPINION BELOW

The opinion of the Oregon Court of Appeals reported at 87 Or. App. 178, 742 P.2d 54 (1987) is included in the Appendix to the Petition for Certiorari.

JURISDICTION

Respondent contends that jurisdiction of this court lies under 28 U.S.C. § 1257(3). For the reasons stated below, 28 U.S.C. § 1257(3) does not confer jurisdiction to review the judgment and opinion.

STATEMENT OF THE CASE

Respondent, Sylvia Shlim, is the owner of certain real property located in Salem, Oregon. Petitioner Alimeg, Inc. is the lessee, and CML, Inc. the sublessee of this property. The present use of the property is as a nursing home. The lease between respondent and petitioner requires payment of rent in the amount of $3,600 and prorata real property taxes on or before the tenth day of each calendar month. Petitioner failed to pay rent and taxes for the month of December, 1984, on or before December 10, 1984, thereby defaulting on the lease. Respondent exercised her right to terminate the lease for nonpayment of rent and taxes.

Respondent commenced this action for forcible entry and detainer (eviction). Prior to trial, Petitioner applied for protection under Chapter 11 of Title 11 of United States Code in the United States Bankruptcy Court for

the District of Oregon. In the bankruptcy proceedings, a stipulated order was entered providing for payment to respondent of administrative rent for the months of February, March, and April, 1985. That order is included in Petitioner's Appendix.

The instant case was tried before the Honorable Thomas C. Beck in Marion District Court on August 23, 1985. Following trial the trial court entered a judgment of restitution restoring possession of the real property to respondent.

Petitioner appealed to the Oregon Court of Appeals. The Oregon Court of Appeals affirmed the decision of the trial court and held that under Oregon state law, the acceptance of rent for the months of February, March, and April, 1985 did not waive petitioner's default in payment of rent for prior months nor reinstate the lease.

Petitioner petitioned for review to the Supreme Court of the State of Oregon. The Supreme Court denied the petition for review without opinion.

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REASONS FOR DENYING THE WRIT

The Petition for Certiorari should not be granted to review the decision of the Supreme Court of the State of Oregon because: (1) the petition does not raise any question of federal law; (2) the question presented in the petition was not raised in nor passed upon by the Oregon Supreme Court, and (3) the decision below is supported by independent and adequate state grounds.

I. The Petition Does Not Raise a Federal Question.

Respondent raised two questions in the proceedings below:

> (1) Does the acceptance of rent for the months of February, March, and April, 1985 constitute waiver of prior defaults?; and
>
> (2) Is notice of the termination of the lease adequate?

The Oregon Court of Appeals held that acceptance of rent for the months of February, March, and April, 1985 did not constitute a waiver of the prior defaults nor reinstate the lease. The court also held that the notice of termination of lease was adequate.

Petitioner asserts that the decision below involved the interpretation and application of 11 U.S.C. § 503(b) and 11 U.S.C. § 365(d)(4).[1] Neither federal statute has any bearing or application to the waiver or notice issues

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[1] 11 U.S.C. § 503(b) provides in relevant part: ". . . (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; . . .".

11 U.S.C. §365(d)(4) provides in relevant part: ". . . (4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is a lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60 day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor. . . .".

presented and decided below. Since the decision below did not involve consideration of a substantial federal question, the Supreme Court of the United States does not have jurisdiction under 28 U.S.C. § 1257(3).

II. The Question Presented In The Petition Was Not Raised Nor Ruled Upon Below.

Oregon appellate courts follow the general practice that issues must be raised at the trial court level before they will be considered on appeal. *Sanger v. Vancouver-Portland Bus Company*, 209 Or. 37, 298 P.2d 835, 304 P.2d 448 (1956). There is no reference in the record of the proceedings at trial or on the appeal to the Oregon Court of Appeals to either federal statute cited by petitioner in the petition. Petitioner first raised the question presented in the petition when review was sought before the Supreme Court of Oregon. Review was denied by the Oregon Supreme Court without opinion.

> "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Fuller v. Oregon*, 417 U.S. 40, 50, note 11 (1974), [quoting *Street v. New York*, 394 U.S. 576, 582 (1969)].

The Supreme Court of Oregon did not interpret or apply 11 U.S.C. § 503(b), or 11 U.S.C. § 365(d)(4), and petitioner has not affirmatively shown that it was for reasons other than petitioner's failure to properly raise the issue before the lower courts.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the court reaffirmed the "not pressed or passed upon below" rule in declining to consider a federal question that was not properly raised or passed upon by the state court. The

court's only power over a state judgment is to correct the judgment to the extent that it incorrectly adjudges federal rights. *Herb v. Pitcairn*, 324 U.S. 117 (1945). The decision below did not pass upon the federal question. When the state has not passed upon the federal question, that question is not properly before the Supreme Court of the United States.

III. The Decision Below Is Supported By Independent And Adequate State Grounds.

It is well accepted that the United States Supreme Court will not review a decision of a state court resting upon adequate and independent nonfederal grounds. *Bell v. Maryland*, 378 U.S. 226 (1963).

The decision of the Oregon Court of Appeals is based solely on state statutory and common law principles. In reaching its decision on the waiver issue, the court below interpreted and applied ORS 91.090 in light of the decision in *Reeves v. Baker*, 270 Or. 837, 530 P.2d (1974). The court found that respondent, by accepting rent for the months of February, March, and April of 1985, did not waive the right to pursue an eviction proceeding predicated on the failure to pay rent for the months of December, 1984, and January, 1985.

In holding for respondent, the Oregon Court of Appeals made no distinction between "administrative rent" and any other type of rent. The determinative factor is whether or not the rent accepted was for the months upon which the eviction action is predicated. Petitioner's contention that respondent was estopped from pursuing the eviction action was argued, analyzed, and decided pursuant to the operation of ORS 91.090 and relevant Oregon

case law. The decision of the Oregon Court of Appeals is adequately supported by operation of state law independent of any federal right or claim.

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CONCLUSION

The petition does not raise a federal question. No federal question was raised or decided in the proceedings below. Independent state grounds support the decision below. For these reasons the Petition for a Writ of Certiorari is without merit and should be denied.

Dated: June 2, 1988

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